The Central Law Journal.

ST. LOUIS, SEPTEMBER 12, 1884.

CURRENT TOPICS.

Col. Robert G. Street, of Texas, in a paper read before the American Bar Association last year took strong ground against the consideration of public policy by judges in passing upon the validity of laws enacted by the legislature. He contended that each department was sovereign within its sphere, and that it is beyond the power of any court to overrule a solemn enactment of the legislative power of the State or nation out of consideration for the public welfare alone; that the legislature is the guardian of the popular interests, and that courts overstep the limits assigned to them when they go behind laws to investigate their wisdom. His views are those which are maintained by that class of men who look upon the ready grasp of public policy which courts seem to have as improper. Others hold different opinions however. They feel as if the judiciary is the guardian of popular liberty, popular welfare, and popular morals. They feel that from the scene of calm, deliberate action which judges occupy, all encroachments upon public weal can be resisted. When men sought to create monopolies in the trades of England, it was the judiciary that stamped her feet upon them and crushed them. When men sought to create a spirit of speculation, the grim figure of justice placed herself at the portals of the courts, and forbade the participants to enter to bring their complaints. It was the judiciary that made "graveyard insurance" impossible. Bentham may inveigh to his heart's content against "judge made" law; judges may call public policy "an unruly horse;" but we owe more to this so-called "unjust assumption of power" than to any other agency.

Monopoly has always been a harlot in the courts. She goes into one door to be cast out of another. It requires no political creed to denounce her. She has driven judges into passions in former days; and while notions of what monopoly is, have decidedly changed in the last two centuries, hostility to the thing itself has in no measure decreased. The spirit which pervaded the old judges is the same spirit which governed the St. Louis Court of Appeals in the case of the St. Louis Gaslight Company. That corporation was given a charter with the exclusive privilege of making and vending gas, in the city of St. Louis, and the grant is held void as creating a monopoly. The following are the important reasons for this judgment in the opinion of Lewis, C. J.:

> The right of property is one of those to whose protection the highest aims of government are directed. The right to labor for the production of property is no less fundamental and unassailable. "The right of property is equally invaded by obstructing the free employment of the means of production, as by violently depriving the proprietor of the product." [Say's Pol., Econ. 133.] Such rights require no grant from the sovereign, but are the common property of all citizens. "This equality of right, with exemption of all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of the citizens of the United States. To them everywhere all pursuits, all vocations, all professions are open without restrictions than such as are imposed equally upon all others of the same age, sex and condition." [83 U. S., 109.] What, then, is the necessary effect, when the State undertakes to confer upon one person or corporation the sole and exclusive privilege of pursuing a lawful calling, labor or occupation, in the manufacturing or selling of any commodity? The first visible effect is, that all persons, other than the grantee, are directly forbidden to pursue that calling, labor or occupation. Here is no franchise within the definitions given. The privilege conferred and withheld is not one "which cannot be exercised without a legislative grant," and it is one which does "belong to the citizens of a country generally by common right." The persons deprived are not in the situation of one who is "only excluded from that to which he never had any right" They have always been, and still should be entitled, as of natural and unquestionable right. There is no granting of anything from the State's prerogatives; no protection given to an exclusive ownership already vested; nothing pretended to be done for preservation of public health, morals or safety. The act is sustained by no element of power confided to the government by constitutional or other authority, and comes within the technical definition of a monopoly. "A monopoly is defined to be an institution or allowance from the sovereign power of the State, by grant, commission or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any liberty they had before, or hindered in their lawful trade. All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law, as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood and putting it in the power of the grantees to enhance the price of commodities."

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From what has been said, the conclusion naturally follows, that so much of the plaintiff's charter as attempts to grant an exclusive privilege of making or vending illuminating gas in the city of St. Louis is void, and cannot be judicially enforced. No reasonable distinction can be entertained between illuminating gas, as an article of manufacture and trade, and any other commodity which people may purchase for their personal comfort and convenience. Such a distinction has never been judicially recognized, unless in its strict relation to the use of the public streets for conveying the article through pipes, or to the lighting of streets by municipal authority for the public benefit. So much of the charter as grants an exclusive right to use the streets of the city for the laying of pipes to convey illuminating gas was a lawful exercise of power vested in the general assembly and was and is effectual for the time being. Whether it must continue to be effectual under all circumstances until the expiration of the plaintiff's charter, depends upon other considerations.

As the case stands, we are not called upon to determine whether the grant concerning the streets was shaped into a contract from which the State cannot recede, so as to bestow like privileges upon parties other than the first grantee. Adjudications are not wanting to the effect that grants strongly resembling that claimed by the plaintiff are lacking in the essentials of a contract, and whose tendencies suggest, at least, that the State might, through its municipal agencies, still assert its control over the streets to the extent of permitting a competitive enjoyment by another of the same privileges conferred upon the plaintiff. State v. Cinn. G. I Co., 18 Ohio St. 262; People v. Bowen, 30 Barb. 21; Norwich G. L. C. Co. v. Norwich City, G. Co., 25 Conn. 19; Citizens' G. L. Co. v. Louisville G. Co. 2 Ky. Law. Rep. 72; Charles R. Bridge v. Warren Br., 26 U. S. 548. But until the State does so, if it may, the plaintiff will be entitled to protection by injunction against rivalry by anyone who cannot show an authority from the same sovereign grantor. Jersey City G. Co. v. Dwight, 29 N. J. Eq.. 242; Crescent City G. Co. v. N. O. G. Co.; Citizens' G. L. Co. v. Louisville G. Co., *supra*. The defendant, however, is not here in a position to make the first point just stated. As a corporation it is competent, by the terms of its amended charter, to make illuminating gas, and to sell and deliver the same, through pipes or otherwise; but an appropriation of the highway to these purposes must derive authorization from another source. A corporation may be empowered by its charter to acquire and hold real estate, but when it would purchase under this power it must first find an owner consenting to sell.

The liability of a parent for the torts of his minor children has often been mooted but is now too well settled in the negative to tolerate doubt. One point has, however, been unsettled, i. e., as to his liability for acts done in his presence. One Noker's children fired off a pistol on a Sunday morning and so frightened the horses of Mrs. Hoverson that they darted forward and threw Sarah out of her seat. On her return from church, the young rascals took the same liberties and she was injured once more. Now it seems that while Noker might not have known of these two occurrences he was well aware of the children's habit, and never sought to destroy it, and in a suit against him evidence was offered of that fact, as well as that the children had done the same thing several times before to the annoyance of others. The *nisi prius* court excluded the evidence, but the Supreme Court of Wisconsin is of opinion that the judge erred. For says Taylor J.:

If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing is certainly equally if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright.

PARTIAL RESTRICTIONS ON BUSINESS FREEDOM.

Covenants which restrain the business or industrial freedom of a person within reasonable limits, (A), as within a town, (B), city (C), or county or district, (D), or on a particular route, (E), or as to a particular class of persons bearing some present relation to the covenantor, (F), or as to particular land (G), are valid.[1]

[1] Of course, the whole doctrine upon which the validity of partial restraints is sustained, is based on the theory that the public interest is not thereby prejudiced. The public interest is superior to private interests; The Morris Run Coal Co. v. The Barclay Coal Co., 68 Pa. St. 173, (1871); and, if any covenant actually injures the public interest, by the control it gives the covenantee over the public, it is void; Horner v. Graves, 7 Bing. 743, per Tindall, C. J. We can imagine a capitalist buying up all rivals in a large district in order to become extortionate, and offering large

Even these agreements as we have seen, were condemned in former times,[2] and an agreement by a journeyman haberdasher in the time of Queen Elizabeth not to carry on his trade for two years in the County of Kent, was declared to be void as against the liberty of a freeman and against the Commonwealth, and Anderson, J., remarked, that the covenantor might as well have bound himself not to go to church.[3] But now "it is regarded as beneficial to the public that contracts for the partial restraint of trade should be upheld to a reasonable extent."[4] They are not upheld says Baron Parke,[5] "because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints of trade are perfectly consistent with public convenience and the general interest, and have been supported."[6]

bounties to all traders to remain away from any portion of the district. It is hardly possible that the courts would sustain any covenant at the instance of men having such objects. It would be an extreme case wherein a covenant in partial restraint of trade would be prejudicial to the public, where there is but a mere substitution, but if the party have no interest in its enforcement, its effect would be to withdraw a rival to a third person and thereby enable him to strengthen his control of the public. It is difficult however, in these days when men are bound to be content with fair profits, when men with money are eager to grasp any opportunity to establish themselves at any place where there is a living chance to make profit, to imagine wherein the public can suffer from the retirement from business of anyone engaged therein.

[2] See Wright v. Ryder, 3 Cal. 357 (1868).

[3] Claygate v. Bachelor Owen. 143.

[4] Per Chapman, J., in Taylor v. Blanchard, 13 Allen 320.

[5] Mallan v. May, 11 M. & W., 664 (1843); Homer v. Ashford, 3 Bing. 326.

[6] And in a case where two physicians agreed in a contingency not to practice within certain limits, it was said that the physician could be as useful to the public at any other town as in the town which he was leaving, as the lives and health of persons in other villages were as important as they were there, and that the community could not be injured by any such stipulation between eminent physicians. Butler v. Burleson 16 Vt. 176 (1876.) "The first object of the law" says Best, C.J., Homer v. Ashford 3 Bing 322, (1825) "is to promote the public interest; the second to preserve the rights of individuals. The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint

A.

Illustrations.

I. A physician agrees with B not to practice within twenty miles of B's residence. The agreement is valid.[7]

II. An apothecary agrees not to set up business within twenty miles of Aylesbury, Eng. The agreement is valid.[8]

III. A agrees in consideration of being taught the trade of shop mistress not to be interested in the same business within half a mile of the the covnantee's place of business in London, Eng. The agreement is valid.[9]

IV. A sells out his farming mill business to B, covenanting not to carry on the same business south of the Wabash river, within thirty miles of Marion, Indiana. The agreement is valid.[10]

on himself. But it may often happen that individual interest and general convenience render engagements not to carry on trade or to act in a profession in a particular place, proper. Manufacturing or dealings cannot be carried on to any great extent without the assistance of agents and servants; these must soon acquire a knowledge of the manufactures or dealings of their employers. Horner v. Graves 7 Bing. 743. A merchant or manufacturer would soon find a rival in every one of his servants if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital or trade, and the promotion of industry." Bigelow, C. J., once said: "The doctrine is now too well settled to be called in question, that a partial restriction on carrying on a trade or business in a particular locality is not open to any objection on the ground of illegality, or violating the rules of sound public policy." Angier v. Webber 14 Allen (Mass.) 211 (1867.) "It" says Christiancy J., of the Michigan Supreme Court, "considered with reference to the situation, business and objects of the parties and in the light of all the surrounding circumstances with reference to which the contract was made the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid." Hubbard v. Miller, 27 Mich. 15 (1873).

[7] Butler v. Burleson 16 Vt. 176 (1844); as surgeon or man—mid-wife Hayward v. Young 2 Chitty 407 (1818) per Lord Tenterden; Gravely v. Barnard L. R. 18 Eq. 518 (1874), 43 L. J. Ch. 659: 30 L. T. N. S. 863.

[8] Hayward v. Young 2 Chitty 407 (1818).

[9] Chesman v. Nainsby 1 Bro. Par. Cas. 234 (1727) aff. 2 Stor. 739, which affirmed 2 Ld. Raym. 1456 (1726).

[10] Bowser v. Bliss 7 Blackf. (Ind.) 344, (1845). So an agreement by one engaged in the butcher business at Eng. in selling out, not to engage in same business within five miles of the premises sold. Elves v. Crofts 10 C. B. 239 (1850) citing with approval, Hitchcock v. Coker 6 A and E. 438 (1837) 33 E. C. L.—1 N. & P. 796, in which all the authorities are reviewed and the principles which they formulate or support. So, of an agreement by a gas fitter not to engage for twenty years, in the business within twenty miles of G. P. St.

V. A sells her millinery business in Felicity, Ohio, to B, and agrees not to carry on in the future the same business at any place, within such distance as might interfere with the business sold. The agreement is valid.[11]

VI. A covenants not to erect or be interested in any wool carding machine within twenty miles of B's machines, without paying $200 a year for each machine. The agreement is good.[12]

VII. A milkman on C street in London agrees to retire from the business for three years, within three miles from that street. He is bound.[13]

VIII. A covenants not to exercise the trade of cow-keeper within five miles of Northampton Square, London, within five years of quitting B's employment. He is bound.[14]

IX. An attorney in London sells B and G his practice and business within London and one hundred and fifty miles from there, agreeing not to solicit any within that distance. The agreement is valid.[15]

X. A in consideration of receiving employment from B, agrees that he will not for twelve months after leaving B's employment, sell mineral oils within a radius of eight miles of the general post-office in London. The agreement is binding.[16]

in Westminster, Eng.; Clarkson v. Edge, 33 Beav. 227, (1863), 10 Jur. N. S. 871, 33 L.J. Ch. 443, 12 W. R. 518; or of a saddler not to carry on his business within ten miles of Croydon, England; Jones v. Heavens, L. R. 4 Ch. Div. 636, (1877); or within twenty miles of Waterville, N.Y., Nobles v. Bates 7 Cow. (N.Y.) 307 (1827) or not of a covenant to carry on the business of soap and ashes manufacturer for ten years within forty miles of Lockport, N. Y.; Ross v. Sadgbeer, 21 Wend. 166, (1839). So covenants not to sell liquors within one mile of Martinsville, Ind.; Harrison v. Lockhart, 25 Ind. 112 (1865) not to practice law within six miles of Chili, Illinois, Linn v. Sigsbee, 67 Ill. 75 (1873) or medicine within ten miles of Litchfield, Conn.; Cook v. Johnson 47 Conn. 175 (1879), or law within twenty-one miles of Torquay, Eng.; Dendy v. Henderson 11 Exch. (H & G) 194 (1855) 24 L. J. Exch. 326; or medicine within ten miles of a town in Pennsylvania, Bett's Appeal 10 W. N. C. 431, or within fifteen miles of Fairfield, Ind.; Miller v. Elliott, 1 Ind. 484 (1849), or within twelve miles of Chandlerville, Pa. McClurg's Appeal 58 Pa. St. 51 (1868), were held to be valid. So covenants not to trade as merchant within ten miles of Marion, Pa.; Gompers v. Rochester 56 Pa. St. 194 (1859), or to act as surgeon or apothecary within seven miles of Macclesfield, Eng.; Sainter v. Ferguson, 7 C. B. 716, (1849) s. c. 13 Jur. 828.

[11] Morgan v. Perhamus, 36 Ohio St. 517 (1881); s. c. 38 Am. Rep. See Shackle v. Baker, 14 Ves. 468, (1808).

[12] Pike v. Thomas, 4 Bibb. (Ky.) 486, (1817); 7 Am. Dec. 741.

[13] Benwell v. Innes, 24 Beav. 307 (1857); s. c. 26 L. J. Ch. 663.

[14] Proctor v. Sargent, 2 Scott N. R. 289 (1840); s. c. 2 M. & G. 20.

[15] Bunn v. Guy, 4 East. 190 (1803).

[16] Middleton v. Brown, Eng. Ct. App. 47 L. J. N. S. (Ch. Div.) 411 (1878). "I think,"

XI. A and B dissolve partnership as publishers, A covenanting not to publish books in London or within one hundred and fifty miles thereof. He is bound.[17]

said the Master of the Rolls in speaking to the motion for an order restraining the covenantor from violating the covenant, "that it is of the utmost importance to state that it is far more beneficial to men in the position of the defendant in my opinion that the order should be made than that it should be refused. Men of this class obtain employment in certain terms which prevent them on leaving that employment from making use of the knowledge which they have acquired during the employment to set up in business against their master and destroy his business. Now, if we said that no such agreement as this would be binding on the man who entered into it, the result might be that no such business would be carried on, and that the men would get no employment at all, and, therefore, if we are to consider the consequences of what we are doing, I think the balance of convenience or inconvenience would show that we ought strictly to enforce such contracts. But I by no means put it on that ground. It appears to me a matter of the utmost importance that courts should keep men to their bargains when fairly entered into. It is not for us to say that the matter is trivial or of slight importance, as those interested in them show us they think them of great importance, and I must say, speaking for myself, as regards this case, it appears to me of very great importance to the plaintiff. He has sixty men in his employment and has a contract with each of them to prevent them for twelve months after leaving his employment from setting up in the same business within eight miles of the General Postoffice, that is, the whole of London in fact. I am not impressed with the argument that the whole of London is too large, or so unreasonably large as to make the bargain invalid. The plaintiff has a business gradually extending and which he will extend no doubt to the utmost of his power, and it may embrace a very considerable portion of London, for men may walk during the day over a considerable number of miles.

[17] Tallis v. Tallis, 1 El. & Bl. 391 (1853); 17 Jur. 1149; 22 L. J. Q. B. 185. The restraint was certainly not unreasonable as to space, but it was claimed that the agreement restrained the covenantor from publishing books, which the public demanded and which the covenantor would not publish, to which the latter replied that the publication of such books would injure him. Lord Campbell could not see that no harm would result to the covenantee from such publications, and expressed his inability to ascertain that the number of subscribers to the covenantee's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And if the covenantor did not make it plain and obviously clear that the covenantee's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications were excluded, the court could not hold the contract void. The covenantor as retiring partner was probably acquainted with the business to which the covenant related. He stipulated for and obtained a large price for consenting to the restriction. Without making any offer to return that price, he was attempting to plant himself upon the public weal to justify his breach of faith. To sanction such a proceeding, it must be clear that the compensation to the public would overbalance the private evil arising therefrom.

XII. A sells a newspaper and covenants not to establish another in Albany, New York City, or within eighty miles thereof for eight years. The covenant is valid.[18]

XIII. A payee of a note stipulates that in consideration of the maker's not being "found in the bounds of two hundred miles from this place," he will not bring suit on the note otherwise due in thirty days, for five years. The stipulation is valid.[19]

In all these cases the agreements were required by the parties with whom they were made either to make their business profitable or to secure to the vendees of good will the full benefit of the business sold. In case III, the covenantor was insured the opportunity to learn a trade, and it was but reasonable that she should not utilize her learning to the detriment of her instructor. In case VIII, Bosanquet, J., denied that the agreement was opposed to the policy of the law. It was limited as to time and space. The promisor was about to enter the promisee's service, and the latter was naturally desirous of putting it out of the former's power to take advantage of that circumstance to gain such a knowledge of his customers as might enable him to set up in opposition to him. Such an object was perfectly justifiable and lawful, provided that the restriction imposed was not unlimited, or clearly extravagant in point of time or space.

In referring to the contract in case XIII the court said: "Is it against law or good morals for a man to stipulate with his creditor that, in case he should be two hundred miles away from home or the place of payment he shall not be embarrassed by suit but left free for five years? We do not see the immorality or unlawfulness of such an agreement. It does not even restrict trade; on the contrary, it encourages it, by leaving the defendant free to trade in distant parts without molestation though it subjects him to pay when he returns home, or after five years at least, at all events. If this is an unlawful agreement, the defendant can show it to be so—at present, its unlawfulness is not manifest."

[18] Webb v. Noah, 1 Edw. Ch. (N. Y.) 604 (1832). In Dakin v. Williams, 11 Wend. (N. Y.) 67, (1833), a covenant not to publish a newspaper in Utica, N. Y. was assumed to be valid.

[19] Chittenden v. Ensign, Wright (Ohio) 721 (1834).

B.

Illustrations.

I. A dentist in the village of L. sells his business to B, agreeing never to practice dentistry in L. The agreement is valid.[20]

II. A surgeon and apothecary sold out his business and agreed never to practice in S. without the covenantee's consent. His bond was valid.[21]

III. A baker sells his business in the parish of St. A., H, agreeing not to carry on the business for five years in that place. He is bound.[22]

IV. A covenants not to sell to any person but B, in the town of O, any furniture in his line. The covenant is valid.[23]

V. A physician in selling out to B, covenants not to practice at any time in Maple Rapids, Mich. The covenant is valid.[24]

[20] Cook v. Johnson, 47 Conn. 175 (1879).

[21] Hastings v. Whittley, 2Exch. 611 (1848) citing with approval, Hitchcock v. Coker, 6 Ad. & E. 438 (1837); Mallan v. May, 11 M. & W. 652 (1843); or in Eng. Sainter v. Ferguson, 7 C. B. 716 (1849); 13 Jur. 828; 18 L. J. C. P. 217.

[22] Mitchell v. Reynolds, 1 P. Wms. 181 (1717); s. c. 1 Smiths, L. C. 705, the leading case on the subject, in which a review of all the cases is made and the law governing restraints of trade sought to be placed on a sound footing by Lord Macclesfield, then Chief Justice Parker. The opinion is remarkable for its clearness, and is often quoted. A covenant not to carry on the grocery business in T. Place, Georgia, Jenkins v. Temples, 39 Ga. 655 (1869), or to carry on the hardware business in Grand Haven, Mich.; Hubbard v. Miller, 27 Mich. 15 (1873). So of covenants not to sell liquors in Martinsville, Ind., Harrison v. Lockhart, 25 Ind. 112 (1865), or in Woodfall or Wildcat township, Ind.; McAllister v. Howell, 42 Ind. 15 (1873); and to discontinue a tavern in same town within half a mile of land sold, Heichew v. Hamilton, 3 G. Gr. (Iowa) 593 (1852); or not to trade as merchant in Marion, Pa., Gompers v. Rochester, 56 Pa. St. 194 (1869); or not to act as surgeon or apothecary in Macclesfield, Eng., Sainter v. Ferguson, 7 C. B. 716 (1849), s. c. 13 Jur. 828; or not to trade in agricultural instruments in Winterset, Iowa, and vicinity, Hedge v. Lowe, 47 Iowa, 137 (1877); or not to erect a tanyard in Morganfield, Ky., Grundy v. E wards, 7 J. J. Marsh, (Ky.) 368; s. c. 23 Am. Dec. 489; or not to trade as shoedealer, in Addison, N. Y.; Curtiss v. Gokey 68 N. Y. 300, (1877), or as dressmaker in Felicity, Cleremont County, Ohio; Morgan v. Perhamus 36 Ohio St. 517 (1881), See Rannie v. Irvine, 8 Scott N. R. 674 (1844) 7 M. & G. 969 8 Jur. 1051; 14 L. J. C. P. 10. Taylors of Exeter v. Clarke, 2 Show, 35; Jolliffe v. Brand 2 Roll. Rep 201 s. c. Noy, 98, Bragg v. Farmer, Palm. 172; Prugnell v. Gosse, Alleyn, 67.

[23] W. W. Roller Co. v. Ott, 14 Kan. 609 (1875). So a covenant to sell patent teeth to no other dentist in a town in Vermont, Clark v. Crosby, 37 Vt. 188 (1864).

[24] Doty v. Martin, 32 Mich. 462 (1875), or at South Dearfield, Mass. Gilman v. Dwight, 13 Gray (Mass.) 356 (1859) or at Douglass, Mass., Dwight v. Hamilton, 113 Mass. 175 (1873), Chili, Ill., Linn v. Sigsbee, 67 Ill. 75 (1873); or in Litchfield, Conn., Cook v. Johnson, 47 Conn. 175,

VI. A sells out his law practice at Adell, Iowa, and covenants never to practice there. He is bound.[25]

VII. S, a private banker at Dover, N.J. sold out his business and building to H, agreeing not to do any banking business in the place for ten years. The agreement is valid.[26]

VIII. A sells out his grocery business at Belleville, N. J., agreeing not to carry on the grocery business there for ten years unless the promisee should discontinue the business as a grocer there. The agreement is valid.[27]

C.

Illustrations.

I. A and B, partners in the perfume business dissolve, A assigning his interest therein to B, and agreeing not to carry on the trade during his life within the cities of London or Westminster. The covenant is valid.[28]

II. A in consideration of being taught the business of surgeon dentist by B agrees not to carry on the business in the city of London, where B practiced. The agreement is valid.[29]

III. A sells to B his stall in the butcher market of New Orleans, La., agreeing not to carry on the same business in that city for two years. His contract is valid.[30]

IV. A sells B his good will in the Savannah, Georgia, hide market, agreeing not to trade in green hides, etc., in that market, but to use his influence in favor of B. The agreement is valid.[31]

It was contended in case II that for so large a population as London possessed, the limit was too large. But the court replied that there were so many more dentists by reason of so large a population, it was of doubtful expediency to interfere with the contract of the parties, and refused to disturb it.

The contract in case III, said the court, did not come within any of the rules laid down in the English authorities on the subject or recognized in other States, some of which the court declared that they should hesitate in adopting as inapplicable to the condition of things in their State. The effect of such contracts as that involved in the case before them, upon the public weal was too remote to be noticed.

D.

Illustrations.

I. L covenants with W not to be connected for a time specified with the manufacture of stearin candles in any part of Hamilton county, Ohio. The covenant is valid.[32]

II. A & B, partners in the daguerreotype business and covenanting not to carry on directly or indirectly, or in any way be interested in any such business, or to impart any information thereof to any person within the limits of Worcester county, Mass. The covenant is valid.[33]

III. A buys out a country store from B, the latter agreeing not to be concerned in any leading establishment within a certain district comprising a considerable portion of the county of Cornwall, Eng. The agreement is valid.[34]

IV. A covenants not to ship to New York or Washington, D. C. any poultry coming from the districts from which the poultry were purchased which formed the basis of the business just sold by him to the covenantee. He is bound.[35]

The Court remarked in case III: "the good will is a saleable thing. The terms here are that the vendor should not be concerned in any trading establishment within a certain district. I think there can be no dispute that the district specified in this case is not more extensive than was necessary to support the good will of the trade that was purchased."

(1875); or in the village or town of Saratoga, N. Y.; Mott v. Mott, 11 Barb. (N. Y.) 127 (1851): or in Fairfield, Ind.; Miller v. Elliott, 1 Ind. 484 (1849); or in Gallatin, N. Y., Niver v. Rossman, 18 Barb. (N. Y.) 50 (1853), or in Mitchellville, Iowa, Haldeman v. Simonton, 55 Iowa, 144 (1880), or in Chandlerville, Pa., McClurg's Appeal, 58 Pa. St. 51 (1868).

25 Smalley v. Green, 52 Iowa, 241 (1879).

26 Hoagland v. Segur, 38 N. J. L. 230 (1876).

27 Whitfield v. Levy, 35 N. J. L. (6 Vr.) 149 (1871).

28 Green v. Price 13 M. & W. 195 (1845) s. c. *nomine* Price v. Green 16 M. & W. 346, (1847) See Shackle v. Baker, 14 Ves. 469 (1808).

29 Mallan v. May 11 M. & W. 652 (1843).

30 Wentz v. Vogt, 3 La. Ann. 16 (1848) Veigas v. Forsbee 9 Id. 294; Colmer v. Clarke, Cas. Temp. Hardwicke, 135, or within six blocks of No. 248, Avenue A., N. Y. City, N. Y. Mullen v. Vettel 25 How. Pr. 350 (1864).

31 Goodman v. Henderson 58 Ga. 567 (1877). So covenants not to deal in fancy goods in Cincinnati, Ohio; Thomas v. Administrator, of Miles 3 Ohio St. 274 (1854) or in agricultural instruments in Richmond, Ind., Beard v. Dennis, 6 Ind. 200 (1855) or in cabinet-ware in Buffalo, N. Y.; Weller v. Hersee 10 Hun. (N. Y.) 431 (1877) or in hardware in Hillsboro, Ill.; Stewart v. Challacombe 11 Bradw. (Ill. App.) 379 (1882), or not to engage in the grocery business within certain limits in Boston, Mass., Pierce v. Woodward, 6 Pick 206 (1828) or not to practice as physician in Hastings, Mich. or vicinity; Timmerman v. Dever 17 N. W. Rep. 230; 28 Am. Law. Reg. 50 (1883), where a note is appended which will deserve notice. So a covenant not to publish a newspaper in Utica, N. Y. was assumed to be valid in Dakin v. Williams 11 Wend. (N. Y.) 67, (1833).

32 Lange v. Werk 2 Ohio St. 519, (1853); or to deal in cabinet-ware in Erie county, N. Y., Weller v. Hersee 10 Hun. (N. Y.) 431 (1877).

33 Dean v. Emerson 102 Mass. 480 (1869).

34 Avery v. Langford, 1 Kay 663, (1854).

35 Richardson v. Peacock, 33 N. J. Eq. (6 Stew.) 597 (1881) affirming s. c. 28 N. J. Eq. (1 Stew.) 15

E.

Illustrations.

I. C and D, in selling their bakery to A and B, promise never to engage in the business of bakers or in any business which shall interfere with the business sold, on their several bread routes, for five years. The agreement is valid.[36]

II. A covenants not to carry on the tobacco business on a certain route, embracing the cities of Albany and Schenectady, N. Y. and surrounding towns. The agreement is valid.[37]

III. A covenants not to run any carts over the butcher route sold by him to B. He is bound.[38]

IV. A, in getting employment to travel for a house over a route, agreed that, if he quit traveling for the house, and traveled over the same route for another house, he would pay the former £50. His agreement is binding.[39]

V. A and C in order to procure B's consent to A's release from service covenants with A not to travel or solicit orders on any part of a certain route comprising certain towns for fourteen years. The covenant is valid.[40]

VI. A, the owner of an exclusive ferry franchise between two points, covenanted on the sale of it to B, never to establish a rival ferry on his own lands, while B should maintain the one sold. The covenant is valid.[41]

VII. A covenants not to be concerned in the stage business on the Washington & Baltimore road. The covenant is valid.[42]

VIII. A promises B not to run any stage from Providence, R. I., to Boston, in opposition to B. The promise is good.[43]

IX. A agrees with B to discontinue his express business from London to several places. He is bound.[44]

X. B covenants with C never to be interested in any boats running from Rochester to Buffalo, N. Y. He is bound.[45]

XI. A, B and C, partners in the business of wagoners, between Boston and Somerville. Mass., dissolve, B and C., selling out to A and agreeing never "in any manner to do anything which shall in any wise impair or injure the said interest and good will in the teaming business" released. The agreement is valid.[46]

The public had no interest in the contract, in case VIII; it merely restrained the defendant from running in opposition to the plaintiff, and, if the latter did not run, the former might do so, and it was indifferent to the public which run the stage, so long as one of the two furnished accommodation.

F.

Illustrations.

I. A soap manufacturer sells out his apparatus for soap making to B, and "all his trade and customers." The contract is valid and the vendor cannot again do the business with the old customers.[47]

II. A binds himself as clerk to B for five years, and covenants not any time, directly or indirectly to interfere or intermeddle with the business of B as attorney, agent or otherwise, for any person who should be B's clients at his quitting B's service. The covenant is valid.[48]

III. A in the sale of his bakery to B agrees never to solicit any trade from the customers who had traded on the sold premises.[49]

IV. A physician agrees to send all his prescriptions to be filled by one druggist. The agreement is valid.[50]

V. A dyer and scourer in Baltimore, Md., sells his establishment to B covenanting at no time thereafter, directly or indirectly to compete with B for the good will and custom sold. The covenant is valid.[51]

[36] Boutelle v. Smith, 116 Mass. 111 (1874).

[37] Ewing v. Johnson, 34 How. Pr. (N. Y.) 202, (1864).

[38] Perkins v. Clay, 54 N. H. 518, (1874).

[39] Mumford v. Gething, 6 Jur. (N. S.) 428 (18); s. c. 29 N. J. C. P. 105; 8 W. R. 187; 1 L. T. N. S. 64, 7 C. B. N. S. 305.

[40] Homer v. Ashford, 3 Bing. 322 (1825).

[41] Westfall v. Mapes, 3 Grant (Pa.) Cas. 198 (1855).

[42] Davis v. Johnson, 2 Gill. & J. (Md.) 382 (1830.)

[43] Pierce v. Fuller, 8 Mass. 223 (1811). So, of an agreement not to run a coach between London and England during certain hours of the day. Leighton v. Wales, 3 M. & W. 545 (1838).

[44] Archer v. Marsh, 6 A. & E. 959 (1837), s. c. 2 N. & P. 562; W. W. & D. 641; 2 H. & W. 464.

[45] Chappell v. Brockway, 21 Wend. (N. Y.) 159 (1839). In Dunlop v. Gregory, 10 N. Y. 241 (1851), a covenant not to run any boats from New York north of Sauguties on the Hudson River, was upheld. And the same may be said of a covenant not to run on certain waters of California, California Steam Navigation Co. v. Wright, 6 Cal. 258 (1856), or not to run a certain boat on any waters of the same State, Oregon Steam Navigation Co. v. Wright, 20 Wall. (U. S.) 67 (1873). But see *contra* Wright v. Ryder, 36 Cal. 357, (1868).

[46] Angier v. Webber, 14 Allen, 211 (1867).

[47] Warren v. Jones, 51 Me. 146 (1862).

[48] Nichols v. Stretton 10 Q. B. 344 (1847) s. c. 7 Beav. 42. But the residue of the agreement, i. e., not to interfere with any persons who might at any time become B's clients was condemned.

[49] Rannie v. Irvine, 8 Scott N. R. 674, (1844) s. c. 7 M. & G. 969, 8 Jur. 1051, 14 L. J. C. P. 10.

[50] Ward v. Hogan 11 Abb. N. C. 478 (1882). So of an agreement not to employ anyone but B to make cordage for the covenantor's friends; Gale v. Reed, 8 East. 80 (1860); or an agreement not to receive any persons into a private park if they came by any other stage but that of the covenantee.

[51] Guerand v. Dandelet, 32 Md. 561 (1870) citing with approval, Green v. Price 13 M. & W. 695, (1845)

It was objected in case III that such customers might wander from the district and that the contract would restrain the defendant from supplying them whithersoever they might go; and it might be that they could obtain so necessary an article as bread from no one else. But the court replied that since the contract was a reasonable one at the time it was entered into, they were not bound to regard such improbable and extravagant contingencies.

It was contended that the covenant in case V was too comprehensive in its restriction, and therefore, was void. "But," said the court in delivering its opinion: "we perceive nothing in it to render it obnoxious to the objection. The authorities sustain restrictions more comprehensive than that imposed by this covenant."

G.

Illustration.

I. The lessee of a tavern agrees that they and their assigns shall take all the beer needed thereat from the brewery of E. & Co., or pay a high advance. The covenantors are bound to take the covenantee's beer, if it be good.[52]

Lord Ellenborough in Catt v. Tourle[53] said: "The whole of these leases, by which people of the description of the plaintiff are prevented from having the article they deal in from those who will serve them best, are extremely injurious to the public interest and welfare. However, no man is bound to make himself a sacrifice to such a covenant as this. On the contrary, it is his duty in respect to the public health to resist it." This of course refers only to the duty of the covenantor to resist the attempt to compel him to take beer of poor quality and not as throwing a doubt upon the validity of the agreements.

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s. c. 16 M. & W. 346 (1847), *sub nomine* Price v. Green; Alkys v. Kinier 4 Exch. Rep. 776; Davis v. Mason 5 T. R. (D. & E.) 118. See Hundlocke v. Blacklowe, 2 Saund. 156.

52 Jones v. Edney, 3 Camp. 285 (1812) S. P., Cooper v. Tourbill, 3 Id. 285, note; Catt v. Tourle, 38L. J. Ch. N. S. 665 (1812); s. c. 21 L. T. N. S. 188.

53 38 L. J. Ch. (N. S.) 665 (1812); s. c. 21 L. T. N. S. 188.

RECOVERY UNDER THE CIVIL DAMAGE LAW, WHERE DEATH RESULTS.

There is some question whether under a statute giving to certain aggrieved parties a right of action against liquor dealers, who sell or give their liquors to persons who become thereby intoxicated, and in this condition lose their lives, there can be any recovery. Numerous States have statutes to this effect, but in this connection it is only necessary to state that their essential parts are nearly the same. So that in discussing this question, while it may seem fruitless because it is one of the legislative intent, yet as a matter of fact the enactments are so nearly alike that they are capable of generalization, to a certain extent. If the statute itself expressly provides that if the death of the party to whom the liquor has been sold results from intoxication, there can be no difficulty in construing its meaning but as yet, unless very recently, no legislature has seen fit to provide for cases of this nature which may arise.

The authorities are not altogether harmonious in the same State. In Hays v. Phelan[1] the plaintiff's husband died from intoxication. It was held a case had not been made out under the statute which gave to certain persons who had been injured in person or property or means of support, damages for the injury; that a right of action lies against the vendor of the liquor only in cases where it lies also against the intoxicated person. In Jackson v. Brookins the court held to a different rule. In that case plaintiff's husband was killed in an affray while intoxicated. It was held she could recover damages for his death.[2] But the doctrine expressed in Hays v. Phelan, that to sustain an action against the liquor seller one must also lie against the intoxicated person in a late case was not followed.[3] The tendency of a late decision, however, if it has not been to expressly overrule those decisions holding no action would lie for the death of the intoxicated person, explains and declines to follow them in such a way that they are of little importance.[4] But the view that the wife cannot recover damages for the

1 4 Hun. 733. But see dissenting opinion of James, J., reported in 5 Hun. 335.

2 5 Hun. 530. But see *contra* Brookmire v. Monaghan 15 Hun. 16.

3 Volans v. Owen 74 N. Y. 526.

4 Mead v. Stratton 87 N Y. 493; 41 Am. Rep. 386.

intoxication of the husband where it results in death is adopted in a case in Ohio,[5] McIlvain, J., in delivering the opinion of the court, says: "She had an interest in his labor and in his capacity to labor as a means of support during his life, but after his death this means of support no longer existed, and was not the subject of injury or diminution. But to avoid any charge of hypercriticism we place our decision upon the ground, that in view of the previous state of the law, and the mischief sought to be remedied, we can find no expression in the statute that indicates an intention on the part of the legislature to bring the loss of labor caused by the death of the person intoxicated within the meaning of the term 'means of support,' for an injury to which a right of action is given by the statute." But on the other hand it is argued with much force, that a statute which does not define or enumerate the injuries intended to be covered, but states generally injuries to the person or property or means of support in consequence of the intoxication of any person, and that if death ensues as a result of such intoxication, it is included necessarily by the language of the statute; if the action for death were excluded the minor injuries would be provided for, while damages for the death of the individual the greatest injury both as to the means of support and person, and property, would remain unprovided for.[6]

We are to remember, however, that at common law no action lay for the death of a human being, and that to sustain such an action there must be some legislative enactment. And we are also to consider whether the intent of the legislature in enacting the civil damage statute was not to go beyond the common law rule and provide a remedy for injuries produced by intoxication to the means of support of the injured party, whether the injury was the result of a temporary cause such as illness or of a permanent cause, such as death.[7] The dissenting opinion of Mr. Justice Boynton, which we have already noticed, regards the intent of the legislature, to require the liquor seller to make compensation in damages to the injured party, and this whether there was an injury to the means of support. by sickness or death. He says "The argument of counsel * * * * * and the judgment of the court seem to be founded on the mistaken notion that the action is brought to recover damages for the death of the husband. Such is not the case. The wrongful act which constitutes the ground of the action is the illegal sale of the liquor, causing the intoxication from which the injury results. The death of the husband only affects the measure of damages. It destroys his ability to labor, and thereby diminishes the wife's means of support. If the husband had lost both his arms or legs, or become permanently insane in consequence of the intoxication, or had otherwise become permanently disabled to perform physical labor, and had survived, the result to the wife would have been precisely the same. Her injury in either case would consist in the deprivation of the means of support resulting from the loss of her husband's ability to labor. There is not the slightest foundation in reason or justice, for an intention on the part of the legislature to authorize a recovery for an illegal sale causing intoxication resulting in death. Indeed there is much more reason to award damages for the injury in the latter case. That the Legislature intended to authorize a recovery in the one case, and not in the other, is an assumption not only not warranted by, but in clear contravention of the express provisions of the statute."[8]

The Illinois courts draw a line, between cases where the death is the direct result of the intoxication, and where there are intervening causes, resulting in death, holding in the one instance the seller of the liquor is liable while in the other he is not. Thus when the intoxicated individual is killed in the affray, it is held the sale of the liquor is not

[5] Davis v. Justice 31 Ohio St. 359, Boynton, J., dissenting. The following cases hold there may be a recovery for death resulting from the intoxication: Schroder v. Crawford 94 Ill. 357; Hackett v. Smelsley 77 Id. 109; Rafferty v. Buckman 46 Iowa 195; Roose v. Perkins 9 Neb. 304; Smith v. Reynolds 8 Hun. 128; Davis v. Strandish 26 Hun. 608; Emory v. Addis 71 Ill. 273; Mead v. Stratton 87 N. Y. 493. But see *contra*; Barrett v. Dolan 130 Mass. 366; Brookmire v. Monaghan 15 Hun. 16; Shugart v. Egan 83 Ill. 56; Schmidt v. Mitchell 84 Id. 195; Collier v. Early 54 Ind. 559; Krach v. Heilman 53 Id. 317; Backes v. Dant. 55 Id. 181; Kirchner v. Myers 35 Ohio St. 85, Boynton, J., dissenting 35 Am. Rep. 598; Davis v. Justice 31 Ohio St. 359.

[6] Jackson v. Brookins 5 Hun. 530.

[7] See dissenting opinions of Boynton, J. and James, J., *supra*.

[8] Davis v. Justice 31 Ohio St. 365.

the direct cause of his death and the defendant is therefore not liable. If death was the result of exposure and the like, the case would be different.[9] But this brings us to a discussion of the question of proximate and remote causation, which for lack of space we shall be obliged to pass.

Where damages for the death of a husband caused by the sale of intoxicating liquors were allowed, it was held the jury might estimate the damages, with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future, and that she is entitled to such a sum as, in a pecuniary point of view, would make her whole.[10] Only actual and not exemplary damages are allowed in actions where death ensues.[11]

In most of the cases that we have noticed, that have held there can be no recovery for the loss to the means of support by the death of the husband, the facts have perhaps justified the courts in deciding as they have done. Intervening causes not the result of the intoxication have contributed to the death. Other cases in which the intoxication was not more immediately the cause of death than in those cases, have been decided the other way; as where the husband was killed by a train while lying in a drunken condition on the track;[12] where he was killed by falling out of a buggy while intoxicated;[13] or by driving or falling into a stream and being drowned.[14] So also where he was killed in an affray while drunk, the homicide being produced by quarrelsomeness produced by intoxication.[15] In these cases recoveries for such injuries have been upheld on the ground that the intoxication was the proximate though not the immediate cause of death. It is said if the defendant had not produced the intoxication by the sale of the liquor the injury to the plaintiff by the death, would not have ensued. This seems to be a sound position. If the husband should be injured and subsequently die, the loss of support would occur before the death of the husband. The death of the husband, while it might affect the measure of damages would not destroy the right of action for any injury to the means of support, for the loss occurs previous to the death of the husband, and it can in no way be affected by the death.[16]

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[9] Shugart v. Egan 83 Ill. 56; Schmidt v. Mitchell 84 Id. 195, Mr. Chief Justice Sheldon and Mr. Justice Scott dissenting in both cases.

[10] Rafferty v. Buckman 46 Iowa 195.

[11] Roose v. Perkins 9 Neb. 304.

[12] Smith v. Reynolds 8 Hun. 128; Schroeder v. Crawford 94 Ill. 357.

[13] Mead v. Stratton 87 N. Y. 493; 41 Am. Rep. 386.

[14] Hackett v. Smelsley 77 Ill. 109, Davis v. Strandish 26 Hun. 608.

[15] Bedore v. Newton 54 N. H. 117; Jackson v. Brookins 5 Hun. 530.

[16] See Schneider v. Rosier 21 Ohio St. 98; Roose v. Perkins *supra*.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS— FOURTH OF JULY CELEBRATION.

TINDLEY v. CITY OF SALEM.

Supreme Judicial Court of Massachusetts, June, 1884.

The celebration of a holiday, when undertaken by a city exclusively for the gratuitous amusement or instruction of the public, under the authority of a general law applicable to all cities alike, does not render the city liable to an action by an individual who has sustained a personal injury through the negligence of the officers, servants or agents of the city in carrying out the celebration.

The City of Salem caused fireworks to be exhibited to celebrate the Fourth of July, under the authority of P. S., ch. 28, sec. 13, and by the negligence of those in charge of the exhibition, plaintiff was injured. Suit being brought against the city for damages, it objected, that as a municipal corporation, it was not liable for such negligence of its officers, which objection the court below sustained.

C. P. Thompson and *W. F. M. Collins*, for plaintiff; *James A. Gillis*, for defendant.

Allen, J., delivered the opinion of the court.

It may not be easy to reconcile all of the dicta, and perhaps not all of the decisions, in actions in which it has been sought to hold cities or towns responsible for injuries to persons or property sustained through negligence or wrong doing on the part of the cities or towns themselves, or of persons alleged to have acted as their agents or servants. Many of the cases, however, can be distributed into classes which have now come to be recognized, although in some instances the principles upon which the decisions ought ultimately to rest, may still be somewhat shadowy. There are certain cases where the act of the city or town has of itself a natural and direct tendency to injure the property of another quite irrespectively of any negligence in the performance of it. In such

cases if the act is within the authority of the city or town, it is responsible. Proprietors of Locks and Canals v. Lowell, 7 Gray, 223; Hildreth v. Lowell, 11 Gray, 345; Haskell v. New Bedford, 108 Mass. 208: otherwise not; Leach v. Newton, 134 Mass. 476; Cushing v. Bedford, 125 Mass. 526.

There are other cases, where it has been held that it is the duty of a city or town in building a highway or bridge across a natural stream of water, to make and maintain a suitable provision for the free passage of the water so that it shall not be set back; and that the city or town is responsible for any failure in the performance of this duty; and as such failure is usually through negligence, the remedy is usually by an action at law; Lawrence v. Fairhaven, 5 Gray, 116, 119, 120; Perry v. Worcester, 6 Gray, 544; Parker v. Lowell, 11 Gray, 353; Wheeler v. Worcester, 10 Allen, 591.

There are other cases where a city or town has undertaken to build and maintain particular works as for example, sewers, water works, and gas works, in part for the general benefit, and in part for the benefit of such individuals as may be able to use them advantageously, and where the expense is defrayed in the first instance either wholly or partly by assessments upon the estates immediately benefitted, or where a charge is made by way of toll or rent, to those who avail themselves of the benefit of the works. In such cases the work is not undertaken purely as a matter of common public convenience and service for the benefit of all alike, but the city or town acts as an agency to carry on an enterprise partly commercial in its character, for the purpose of furnishing conveniences and benefits to such as pay for them. The element of a consideration comes in, and in such cases it is usually held that a liability exists for an injury to an individual through negligence in building or maintaining the works. Child v. Boston, 4 Allen, 41; Oliver v. Worcester, 102 Mass. 500; Emery v. Lowell, 104 Mass. 13; Merrifield v. Worcester, 110 Mass. 216; Murphy v. Lowell, 124 Mass. 564.

There are other cases of which the repairs of roads and bridges furnishes the usual example, where by reason of its statutory liability for injuries sustained through neglect of keeping ways safe and convenient for travelers and of the statutory penalties upon it for defective ways, as well as by reason of its responsibility for the cost of construction, a city or town incurs a liability by undertaking the performance of a public work, in which it has advised pecuniary interest to see that it is done not only economically but thoroughly. In some of these cases, the assumption of the work by the town itself has been voluntary, and apparently because it preferred that the work should be done by special agents rather than by the surveyors or others upon whom in the absence of such special provision, the law would devolve the duty of prosecuting it. But in all such cases a prominent element in the action of the city or town must have been with reference to its continuing liability to statutory penalties or responsibility in damages to persons who might receive injury in their persons or property through defects in the ways. This consideration was made the foundation of the decision in Hawkes v. Charlemont, 107 Mass. 414. The case of Deane v. Randolph is of the same class. In Sullivan v. Holyoke, 135 Mass. 273, there was evidence tending to show that as incident to its liability for defective ways, the city had undertaken to light the streets, though not bound to do so, and that it kept naptha for that purpose, and stored it. The case was a close one, but in the opinion of a majority of the court it fell within the principle of Hawks v. Charlemont and Deane v. Randolph. All that was decided in Perry v. Worcester, 6 Gray 544, may stand also upon the same ground as well as upon the ground heretofore mentioned. The city had voluntarily assumed, by agents of its own, to rebuild a bridge which it was bound to maintain and keep in repair, and it performed the work in such a manner as to cause injury to private property through unskilfullness or negligence. In all of these cases the city or town was acting not merely in the discharge of a public service, but also with reference to penalties and liabilities imposed upon it by law for imperfect work. The pecuniary motive came in. It was acting in furtherance of its own pecuniary interest, as well as for the benefit of the public. Easily distinguishable from these are the cases where the city or town is exonerated from liability on the ground that the wrongful act complained of is not its act, but the act of persons who are deemed to be public officers existing under independent provisions of law; officers who, though appointed and paid by the city or town, and though perhaps its agents or servants for other purposes, are yet held not to sustain this relation in respect to the particular act in question: as, for example, members of a fire department, Hafford v. New Bedford, 16 Gray 297; Fisher v. Boston, 104 Mass. 87; highway surveyors, Walcott v. Swampscott, 1 Allen, 101; Superintendent of Streets, Barney v. Lowell, 98 Mass. 571; police officers, Buttrick v. Lowell, 1 Allen, 172; Overseers of the poor, New Bedford v. Taunton, 9 Allen, 209; Assessors and Collector of taxes, Rossere v. Boston, 4 Allen 573; Alger v. Easton, 119 Mass. 77; Deputy Collector, Dunbar v. Boston, 112 Mass. 75; Selectmen, Cushing v. Bedford, 125 Mass. 526; Board of Aldermen, Child v. Boston, 4 Allen 51, 52; and even the city government itself, Griggs v. Foote, 4 Allen 195.

There is another class of cases, where cities or towns have been held to be not liable for negligence when, acting under general laws applicable to all cities and towns alike, they have undertaken a particular service or work which has no direct or natural tendency to injure any individual in person or property, and no element of special corporate advantage as a consideration for undertaking it, or of pecuniary profit or contribution

from individuals especially benefited either by way of aid in the performance of the work or of compensation for its use or benefit after its completion and where no pecuniary penalty or liability is imposed by statute in case of defective or negligent performance of the undertaking; but where their action is exclusively and purely as a matter of public service for the general and common good. In some cases the statutes enjoin such service upon cities and towns; and in others permit it. The decisions in Hafford v. New Bedford and Fisher v. Boston already cited fall within this class, and rest as well upon this ground as upon the doctrine of master and servant. So also the case of Bigelow v. Randolph, 14 Gray 541, where it was held that the town was not liable for a personal injury to a scholar attending a public school, received by falling into a dangerous excavation negligently left in a school house yard. Oliver v. Worcester, 102 Mass. 489, also furnishes a good illustration of this ground of exemption from liability. And in the recent case of Hill v. Boston 122 Mass. 351, it was held on the greatest consideration and upon a very full consideration of the authorities that the city of Boston was not liable in an action brought by a child attending a public school for an injury sustained through he negligent construction of a school house which the city was bound by a general law to provide and maintain. The duty resting upon the city in that case was imperative. The reasoning upon which the decision rests would be directly applicable to the present case, but for the distinction that the negligence now complained of was not in the performance of a duty imperatively required, but of a service voluntarily assumed by the defendants under the authority of Public Statutes c. 28 sec. 13. This statute provides that the city council of a city may by a yea and nay vote of two-thirds of the members of each branch thereof present and voting, appropriate money to a certain limited amount for armories for the use of military companies, for the celebration of holidays, and for other public purposes. The same question arose in Morrison v. Lawrence 98 Mass. 219, but the case went off on another ground. In our opinion this distinction does not affect the resulting liability. There are many provisions of statutes by which all municipal corporations must do certain things and ascertain other things, in each instance with a view solely to the general good, in looking at these provisions in detail, it is impossible to suppose that the legislature have intended to make this distinction a material one in determining the question of corporate liability to private actions. For example towns must maintain pounds, guide posts and burial grounds, and may establish and maintain hospitals, workhouses, or alms houses, town halls, libraries, public baths, monuments in memory of soldiers, quarantine grounds, may plant shade trees and may raise money for centennial celebrations, for the destruction of noxious animals, for the detection and apprehension of felons, and for building armories. Public Statutes c. 36, sec. 20; c. 53, sec. 1; c. 82, sec. 9; c. 80, sec. 70; c. 84, sec. 20; c. 33, sec., 1; c. 27, sec. 41; c. 40, sec. 10; c. 27, sec. 13, 10; c. 80, sec. 62; c. 34, sec. 1; c. 27, sec. 12, 11, 10; c. 14, sec. 163. In some instances large towns must and small towns may do certain things. Every town may and every town containing five hundred families must maintain a high school; every town may and every town containing more than 10,000 inhabitants must provide for instruction in industrial and mechanical drawing; towns, if they see fit, may also establish and maintain industrial and nautical schools; and every town not divided into school districts must provide and maintain a sufficient number of school houses.

Public Statutes c. 44, sec. 2, 7, 8, 9, 46. Each town containing more than 3000 inhabitants must, and every town may keep and maintain a lock-up. Public Statutes c. 27, sec. 32. In all of these cases the duty is imposed or the authority conferred for the general benefit. The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work and withheld when it performs the service under the requirement of an imperative law. To make such a distinction would not have the effect to encourage towns in making liberal provision for the public good. It is well known that many towns in Massachusetts not bound to do so voluntarily maintain high schools. It is not to be supposed that the legislature have intended to make such towns liable to private actions when towns required to maintain high schools would be exempt. On the other hand, it has been recognized in numerous cases in this state and elsewhere, that the question of the liability of towns does not rest upon this distinction. Bigelow v. Randolph 14 Gray 541, Hafford v. New Bedford, 16 Gray 297; Fisher v. Boston 104 Mass. 87; Clarke v. Waltham 128 Mass. 567; Eastman v. Meredith 36 N. H. 284; Nixon v. Newport 13 R. I. 457; Richmond v. Long 17 Gratt. 375.

The dictum of Chief Justice Shaw in Anthony v. Adams 1 Met. 284, that "an action upon the case will lie against municipal corporations, when such corporations are in the execution of powers conferred upon them or in the performance of duties required of them by law, and their officers, servants and agents shall perform their acts so carelessly, improperly or unskilfully as to cause damage to others" is sometimes cited as declaring that in the case supposed such action will lie always and under all circumstances, whereas it was only intended to assert that a municipal corporation is not exempt from liability in an action on the case, and to declare that such an action may be maintained under proper circumstances; that

is to say that a municipal corporation is not exempt from such action under proper circumstances merely by reason of its corporate character.

We are of the opinion that the present case falls within the principle of Hill v. Boston, that the ground of distinction sought to be established is untenable, and that the celebration of a holiday when undertaken by a city exclusively for the gratuitous amusement, entertainment or instruction of the public, under the authority of the general law already referred to, which is applicable to all cities alike, does not render the city liable to an action by an individual who has sustained a a personal injury through negligence in carrying out the celebration. We cannot think that the legislature, while carefully limiting the amount which may be expended for the purposes in question, intended to impose upon cities a liability to private actions. If such an extension of liability had been intended, we think it reasonable to suppose tha the legislature would have expressed such intention in plain terms.

Judgmen affirmed.

NOTE.—In Condict v. Mayor, etc., 16 Vr., it has been just held that a municipal corporation is not liable for an injury occasioned by the negligence of a driver employed by its board of public works to remove ashes and refuse from boxes and barrels placed on the sidewalks, to a public dumping-ground, though the driver was at the time driving a horse and cart owned by the city, and his negligence was in making a dump from the cart. Said the court, in its opinion:

In the execution of the duties of a municipal government, the services of inferior officers having only ministerial duties to perform, and of workmen and other employes, are required for the transaction of its business; and the principle on which the cases above cited were decided would be of little importance if the municipality was liable to actions for the negligence of such persons. It has been held that with respect to such officers and employes, the doctrine of *respondeat superior* does not apply. Thus, a city is not liable to an action for the negligence of its assessor and collector in assessing and levying taxes; Alger v. Easton, 119 Mass. 77; nor for the wrongful acts of its police officers in the enforcement of ordinances, Buttrick v. City of Lowell, 1 Allen, 172; Calwell v. City of Boone, 51 Iowa, 687; nor for the negligence of its officers and agents in executing sanitary regulations for preventing the spread of contagious diseases, Ogg v. City of Lansing, 35 Iowa 495; Brown v. Inhabitants of Vinalhaven, 65 Me. 402; nor for the negligence of the members of its fire department, Jewett v. City of New Haven, 38 Conn. 368; Smith v. City of Rochester, 76 N. Y. 506-513; Boone on Corp., sec. 301. A person who has suffered an injury by reason of the neglect of the selectmen, or of the physician employed by them, in the performance of duties imposed upon town officers in relation to the small-pox, has no remedy against the town therefor. Brown v. Vinalhaven *supra*. One who is injured in his person or property by the negligence or misconduct of members of a fire department when engaged in extinguishing a fire, cannot hold the city liable in damages, though the fire department was organized under the provisions of the city charter, and its members were selected and paid by the city. Hafford v. New Bedford, 16 Gray 297; Fisher v. City of Boston, 104 Mass. 87; Jewett v. City of New Haven *supra*; Howard v. City of San Francisco, 51 Cal. 52; Hayes v. City of Oshkosh, 33 Wis. 314. A town is not liable for an injury sustained by reason of the negligence of a laborer employed by one of its highway surveyors to aid him in performing the duties of his office. Walcot v. Swampscott, 1 Allen 101. Nor is a city liable for an injury caused by the negligence of a teamster employed in transporting stone to repair a highway by the superintendent of streets, who is charged with the duty of keeping the streets in repair. Barney v. Lowell, 98 Mass. 570. A city is not liable for the negligence of of an employee of the commissioners of public charities in driving an ambulance-wagon belonging to the city, which struck and caused the death of the plaintiff's intestate. Maxmilian v. Mayor of New York, 62 N. Y. 160. The cases I have cited are not rested wholly on the ground that the persons through whose negligence the injury happened were officers of the municipal government established by the legislature, having an independent tenure of office and particular duties imposed upon them by the charter. In some of the instances the persons by whose negligence the injury was caused were laborers and third persons employed by departments of the municipal government having capacity to represent the city in making the employment, with the power to continue or remove their employees and to control them in the performance of their employments; and the employment was such that, as between private individuals, the doctrine of *respondeat superior* would apply. The true principle on which a municipal corporation is exempted from liability in such cases is that given by Dixon, C. J., in Hayes v. City of Oshkosh, *supra*, that the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants and the community, and the persons employed in the performance of such duties, though employed by the corporation, act as public officers charged with a public service. To maintain in its integrity the doctrine of our courts that a municipal corporation is not amenable to actions for negligence in the performance of public duties, it is necessary to maintain also that persons employed by the corporation in the execution of public duties are mere agencies or instruments by which such duties are performed, and that the doctrine of *respondeat superior* does not apply to such employments. To impose upon the corporation liability for the negligence of such employees would indirectly fix upon the corporation a liability from which it is by law, on considerations of public policy, exempted."

So, in Welsh v. Village of Rutland, 56 Vt. 228, it was recently held that an incorporated village is not liable for damage resulting from the negligence of an engineer of its fire department in thawing out a hydrant, whereby water escaped, formed ice on the street, and a traveler falling on it was injured. Royce, C. J., said: "At common law it has been a settled principle ever since the leading case of Russell v. Men of Devon, 2 T. R. 667, decided by Lord Kenyon in 1788, that an individual cannot sustain an action against a political subdivision of the State based upon the misconduct or non-feasance of public officers. * * * * This rule of exemptions extends, necessarily, to municipal corporations so far as the reason of it applies, and that is so far as the acts done are governmental and political in their character, and solely for the public benefit and protection, or the negligence or non-feasance are in respect of the same matters. * * *

When however municipal corporations are not in the exercise of their purely governmental functions, for the sole and immediate benefit of the public, but are exercising as corporations private franchise powers and privileges, which belong to them for their immediate corporate benefit, or dealing with property held by them for their corporate advantage, gain or emolument, though inuring ultimately to the benefit of the general public, then they become liable for negligent exercise of such powers precisely as are individuals. Hill v. Boston, 122 Mass. 344; 102 Id. 499; Eastman v. Meredith, 36 N. H. 284; Providence v. Clapp, 17 How. 161. So of the construction and maintenance of water-works. Murphy v. Lowell, 124 Mass. 564; 122 Id. 344; 102 Id. 489; City of Dayton v. Pease, 4 Ohio St. 80; Gibson v. Preston, L. R. 5 Q. B. 219; Southcoat v. Stanley, 1 Hurlst. & N. 247; 2 Id. 244; 4 Id. 67. Of ditches or drains; Chicago v. Langlass, 66 Ill. 361; 44 Id. 295. Of bridges or culverts, and in respect of structures which may obstruct the flow of natural water courses, and of the pollution of them by sewage and the like: Hill v. Boston, *supra*; Wheeler v. Worcester, 10 Allen, 591; 4 Id. 41; Parker v. Lowell, 11 Gray, 353; Conrad v. Ithaca, 16 N. Y. 158; Merrifield v. Worcester, *supra*; Hazeltine v. Case, 46 Wis. 391; Hig. Waterc. 96; Wood Nuis., § 688. And public works and improvements generally: Lyme Regis v. Henley, 3 B. & Ad. 77; Nebraska City v. Campbell, 2 Black. 590; 1 Id. 39; Dayton v. Pease, 4 Ohio St. 80; Bigelow v. Randolph, 14 Gray, 543; Child v. Boston, 4 Allen, 41. This rule has been held to apply to the discharge of sewage or other noxious substances in such manner as to pollute the surface-water, and damage the property of individuals. Winn v. Rutland, 52 Vt. 481; Gale Eas. 308; Merrifield v. Lombard, 13 Allen, 16; Johnson v. Jordan, 2 Met. 234. And if a plan adopted for public works must necessarily cause injury or peril to private persons or property, though executed with due care and skill, the law regards the execution of such a plan as negligence. 2 Thomp. Neg. 742; Haskell v. New Bedford, 108 Mass. 208; S. P., 30 Ind. 235; S. P., 35 Mich. 296; S. P., 33 Ala. 116; S. P., 3 Comst. 463. The fire department and its service are of no benefit or profit to the village, in its corporate capacity. They are not a source of income or profit to the village, but of expense, which is paid—not out of any receipts or fund, nor defrayed, even in part, by assessment upon particular persons or classes benefited, as in case of sewers or water works—but from the general fund raised by taxation of all the inhabitants. The benefit accrues, not in any sense to the corporation as such, but directly to the public, and the members or employees of the department, whether acting as an independent, though subordinate organization, or under the direct authority of the general officers of the corporation, are, while acting in the line of duty prescribed for them, not agents of the corporation in the sense which renders it liable for their acts, but are in the discharge of an official duty as public officers. To such it is held in many cases that the doctrine of *respondeat superior* does not apply, and for their acts no liability can be imposed upon the corporation except by statute. Dill. Mun. Corp. (1st ed.), sec. 774; Hafford v. New Bedford, 16 Gray, 297; Fisher v. Boston, 104 Mass. 87; Maxmilian v. Mayor, 62 N. Y. 160; Smith v. Rochester, 76 Id. 513; Jewett v. New Haven, 38 Conn. 368; Ogg v. Lansing, 35 Iowa, 495; Field v. Des Moines, 39 Id. 575; Heller v. Sedalia, 53 Mo. 159; Howard v. San Francisco, 51 Cal. 52; Wilcox v. City of Chicago, Ill. S. C.; Edgerly v. Concord, 59 N. H. 78, 341.

RES ADJUDICATA—IDENTITY OF CAUSE OF ACTION — SUIT FOR WRONGFUL DEATH AFTER RECOVERY BY DECEASED.

DONAHUE v. DREXLER.

Kentucky Court of Appeals, June 3, 1884.

A sued B for assault and battery but settled and dismissed the suit, and he having died shortly afterwards, his widow brought suit, claiming that her husband had died of the injuries inflicted by B, and the former suit for assault and battery was held no bar to her action.

Appeal from Jefferson Common Pleas Court.

Alpheus Baker, *M. Boland*, for appellant. *Byron Bacon*, *Isaac Caldwell*, for appellee.

HARGIS, C. J., delivered the opinion of the court:

In January, 1881, John Donahue brought suit for assault and battery against Frederick Drexler. On the 25th of the following April it was, by written agreement, dismissed, settled, each party paying his own costs. Donahue died the 8th day of May, and his wife, the appellant, on the 24th of September, 1881, instituted this action against Drexler for reparation of the injury resulting to her from the killing of her husband. Her suit is based upon the 6th sect. of ch. 1, Gen. Stats., which reads as follows: "The widow and minor child or children (or either or any of them) of a person killed by the careless, wanton, or malicious use of fire arms, or by any weapon popularly known as colts, brass knucks, or slung shots, or other deadly weapons, not in self defense, may have an action against the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury; and in such action the jury may give vindictive damages." To the petition the appellee filed a general traverse and also pleaded in bar of the appellant's action, the former suit of her husband for assault and battery.

The appellant demurred to the plea in bar, which was overruled, and failing to reply, her petition was dismissed. From the judgment dismissing her action she has appealed.

Does the former suit of the husband for assault and battery and its settlement constitute a bar to her cause of action under the statute, is the question to be determined.

According to ch. 10, Gen. Stats., actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury, cease with the death of the person and can not be brought or revived by the personal representative. The right of action for all other personal injury or injuries to real or personal property survive, notwithstanding the death of the person injuring or the person injured.

It has been held in the case of Hansford's Administratrix v. Payne & Co., *supra*, 11 Bush, 385, that this chapter does not authorize suit by the personal representative where death, from the injury, is instantaneous, its object being to except certain classes of personal injury and injuries to property from the common law rule that personal actions die with the person. That it creates no new causes of action. The same construction was given the statute in the cases of Murphy and Case, 9th Bush.

The case of Connor's Administratrix v. Paul, 12 Bush, 144, has no application to an action like the present, for there the suit was by the personal representative for the death of the intestate under an Indiana statute, and the point decided was that the same personal representative could not maintain another action for the mental and bodily suffering of her intestate which survived under the common law. As the cause of action was based upon the same facts, and the degree of negligence required by the statute being merely higher than at common law, the personal representative was held to an election because an action for the death was a bar to the common law action for mental and bodily suffering before death, 14 B. Monroe, 165. It was also decided in Hansford's Administratrix v. Payne & Co., 12 Bush, 385, that "a recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury or any of its consequences, and if a party elects to sue and enforce the right of action that survives to him, he will not be allowed afterward to avail himself of the benefits of the punitive statute, and also to recover under its provisions."

Those cases were decided upon a different state of facts from the one before us. The recovery in them could have been made only by the personal representative for the pecuniary injury to the estate. There is much good reason to sustain the position of those cases, in the fact that the personal representative could do only what the deceased could have done, had death not ensued.

The representative stands for the deceased, his estate and the rights of his creditors therein, and he should not be allowed to carve up the cause of action any more than the deceased, had he survived the injury. In this case, we find two causes of action with different purposes and reasons for their existence.

The suit for assault and battery could not have survived to the personal representative, for the statute says it shall die with the person injured or injuring. It was a personal action purely for the bodily injury, not for pain, suffering and loss of service to his wife and children after the injury and before death, and the compensation which he had the right to, was extinguished by his death or the settlement which he made. But his right of action for the bodily injury from the assault and battery is wholly distinct from the action which the widow and minor children may have for reparation of the injury resulting to them from the death of the injured. This statute creates a new grievance, a new cause of action, in which neither the deceased nor his estate has any interest, and for which his administrator could not sue. It is based upon the wrong to the wife and children by depriving them of their natural support and protection which the law gives them in the husband and father.

The injury is to them and their rights. They have the exclusive right of action under the statute and are entitled personally to the results of any judgment that may be recovered. This is a highly penal statute passed to protect widows and orphans from pecuniary distress resulting from the acts described in the statute, and to prevent the perpetration of such acts by awarding vindictive damages in addition to or regardless of the punishment which may be inflicted by the criminal law. 25 Hun. (N. Y. S. C.) 627; 23 N. Y. 469. Wherefore the judgment is reversed and cause remanded with directions to sustain the demurrer and for further proper proceedings.

DEED — CONSTRUCTION — FEE SIMPLE — REPRESENTATIVES.

BROWN v. MATTOCKS.

Supreme Court of Pennsylvania.

A deed to one and his "representatives" does not pass to him a fee simple, the word "representatives" not being equivalent to the word "heirs."

Asa Mattocks made a life lease of his farm to his father and mother, providing that after their death, if the grantor did not survive them, the property should go to their five children and "their representatives." The question in the case is whether this passed to the children, the condition precedent having been fulfilled, a fee simple or only a life estate.

E. B. Parsons, and *Evans & Maynard*, for plaintiff in error; *D. Rockwell* and *M. E. Lilley*, for defendant in error.

PAXON, J., delivered the opinion of the court:

It becomes important to ascertain what interest the children of Charles took in the property. The operative words in the deed are, "shall go to and be vested in the five children and their representatives of the said Charles Mattocks." etc. The learned court below held that the children took but a life estate, there being no words of inheritance. The plaintiff in this writ of error contended that they took a fee. In order to sustain his contention we must hold that the word "representatives" is the equivalent of the word "heirs." However this may be in the case of a will where greater laxity of construction is sometimes permitted in order to carry out the intent of a testator, it has been uniformly held that in a deed a fee does not pass without words of inheritance.

"In a will the legal form of the word heirs may sometimes be controlled by the context, but not so in a deed. It is in a deed a work of art:" Hilsman v. Bouslaugh, 1 Harris, 334. The rule of law is that in a present conveyance without the word heirs but an estate for life passes: Gray v. Packer, 4 W. & S., 17. The principle is thus stated by Coke, Vol. I, 493: "For if a man would purchase lands and tenements in fee it behooveth him to have these words in his purchase, to have and to hold to him and his heirs. * * * For these words make the estate of inheritance. For if a man purchase lands by the words 'to have and to hold to him forever,' or by these words, 'to have and to hold him and his assigns forever,' in these two cases he hath but an estate for life, for that there lacks these words (his heirs) which words only make an estate of inheritance in all feoffments and grants." The courts of England and of this State have uniformly held to the above rule in the construction of deeds. The authorities cited by the plaintiff form no exception. They either have no bearing upon the case or are decisions arising under wills where, as we have before observed, a different rule has sometimes been admitted.

Judgment affirmed.

NOTE.—The rule referred to in the principal case is one of the legacies of "ye olden times" "the reasons for the same"—as Tiedeman says "having long since passed away with the advancement of civilization." Tiedeman's Real Property sec. 37. So far has the doctrine been carried that a mortgage of land to an individual his "successor and assignees forever" conveyed only a life estate although it contained a power of sale, which had never been executed, however, authorizing the mortgagee, in case of default, in the performance of the condition to sell the land and execute a conveyance thereof in fee simple, Sedgwick v. Laflin 10 Allen (Mass.) 420 citing Litt. sec. 1, Co. Litt. 1 a., 8 b, Lord Holt says: "The Law appoints that let the intent of the parties be ever so fully expressed and maintained in grants, without the word 'heirs' a fee shall not pass." Bridgewater v. Bolton, 6 Mod. 109 s. c. Holt 281. See Gould v. Lamb, 11 Met. 84; King v. Parker 9 Cush. 79 And although the deed is made in a State, where the law dispenses with the requirement, yet if it be a conveyance of land in a State where the common law doctrine still obtains, the deed conveys no fee. Sedgwick v. Laflin 10 Allen, 430, 433, citing Cutter v. Davenport, 1 Pick, 86; Hosford v. Nichols, 1 Paige 226. It is evident, therefore, that in the construction of a deed the court must not look to the intent of the grantor, but see what he actually does pass by his deed. Adams v. Ross 30 N. J. L. 505, and a conveyance to C. D. for his natural life and at his decease to his children forever, conveys them only a life estate although the covenant of warranty warrants the premises to C. D. and her heirs since a warranty attaches only to the estate granted or purporting to be granted. If it be a life estate, the covenantor warrants nothing more and the conveyance being the principal the covenant being the incident. *Ibid*, Rawle on Cov. for Title, 420; Blanchard v. Brook 12 Pick 67; 2 Coke Litt. 385, b. "The quantity of the estate conveyed must depend upon the operative words of conveyance and not upon the covenants defending the quantity of estate conveyed," Adams v. Ross, *supra*. Compare Shaw v. Gilbreath 7 Pa. St. 111. Littleton says: Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. For if a man would purchase lands, a tenement in fee simple, it behooveth him to have these words in his purchase to have and hold to his heirs," for these words "heirs" make the estate of inheritance. For if a man purchase lands by these words "to have and to hold to him forever" or by these words "to have and to hold to him and his assigns forever," in these two cases he hath but an estate for life for that there lack these words "his heirs," which words only make an estate of inheritance in all feoffments and grants, Co. Litt. Vol. 1, 1a. 8 b. A conveyance, therefore, to a man, "his executors, administrators and assigns" conveys a life estate only. Clearwater v. Rose 1 Blackf. (Ind.) 137 (1821) and a conveyance to O. J. M. and his generation to endure as long as the waters of the Delaware should run was held to pass the same estate. Lessee of Josiah Foster v. Joice 3 Wash. C. C. 498 (1819); Buffum v. Hutchinson 1 Allen (Mass.) 58 (1867); Hollingsworth v. McDonald, 2 Har. & Johnson (Ind.) 230 (1807) s. c. 3 Am. Dec. 545, though other words than "heirs of the body" can qualify the fee into a fee-tail *Ibid*. And when there are no words of limitation in fee simple in the deed, a warranty to defend the estate from the grantor his heirs and assigns forever creates no estate by estoppel. Patterson v. Moore 17 Ark. 222 (1854). The words "and bodily heirs" creates a fee. True v. Nichols 2 Duvall (Ky.) 547; and in Vermont a conveyance to a man and his heirs and assigns as long as wood grows and water runs, was held to create a fee simple. Arms v. Burt, 1 Vt. 303 (1828) 18 Am. Dec. 680. See Propagation Society v. Sharon 28 Vt. 603.

But if the estate be acquired by legislative grant or by devise, the word "heirs" is not necessary. The intention to create a fee simple may in such cases be manifested by any other words or form of expression. Rutherford v. Greene 4 Wheat, 196; Bridgewater v. Bolton, 6 Mod. 109; Newkirk v. Newkirk 2 Caines (N. Y.) 345; Jackson v. Housell 17 Johns (N. Y.) 281; Godfrey v. Humphrey 18 Pick (Mass) 537; Baker v. Bridge 12 Id. 87. See Ulrich's Appeal 86 Pa. St. 386, 27 Am. Rep. 707; Mabley v. Stamback 1 Martin (N. S.) 75, 1 Am. Dec. 545; Turbett v. Turbett, 3 Yeates 187; 2 Am. Dec. 369; Jackson v. Merrill 6 Johns (N. Y.) 185; 5 Am. Dec. 213; Jackson v. Delancy 13 Id. 536, 7 Am. Dec. 804; Doe v. Hurrell, 5 B. & Ad. 21; Lloyd v. Lloyd, L. R. 7 Eq. Cas. 458; Nichols v. Butcher 18 Ves. 195; Roe v. Wright 7 East 258; Ward v. Bartholomew 6 Pick, 409. So words of direct reference to some other estate have been held sufficient to pass a fee without the word "heirs" as where the grantor reconveyed the lands "as fully as they were granted to him," Wickersham v. Bills 8 Ind. 287, 2 Prest. Est. 2. But where the former estate was created by will without the word "heirs" reference to it passes only a life estate, Lyttle v. Lyttle, 10 Watts (Pa.) 259. A conveyance to a corporation requires no words of limitation to vest in it a fee simple. Cong. Soc. v. Stark, 34 Vt. 243; Wilcox v. Wheeler, 47 N. H. 490; Beach v. Haynes, 12 Vt. 15; except when the grantee is a corporation sole, when the word "successors" is requisite. Overseers v. Sears, 22 Pick. (Mass.) 126. So in the case of a conveyance in trust, without words, of inheritance, the trustee takes a fee, if such estate be necessary to fulfill the objects of the trust. Neilson v. Lagon, 12 How. 98; Welch v. Allen, 21 Wend. 147; White v. Woodbury, 9 Pick. 136; North v. Philbrook, 34 Me. 532; Showman v. Miller, 6 Md. 479. In England and most of the States, the old common law rule has been abolished, so that the grant or devise passes a

fee simple, except when the intention to pass a smaller estate is manifest. See Tiedeman on Real Property, sec. 37, notes 4, 5; Boone on Real Property, sec. 17 n. 15. But where no such statutes have been passed, the old rule prevails. Hogan v. Welcker, 14 Mo. 177.

WEEKLY DIGEST OF RECENT CASES.

1. ASSIGNMENT — DRAFT UPON PARTICULAR ACCOUNT.

A direction in a draft to charge the amount of the same to a particular account does not amount to an equitable assignment thereof to the payee. *Whitney v. Eliot Bank*, S. J. C. Mass.; Mass. L Rep., Aug. 25, 1884.

2. ATTACHMENT — BONDS — MANUAL SEIZURE REQUISITE—SUBSEQUENT DELIVERY—EFFECT.

A bond, promissory note or other instrument for the payment of money can be attached only by taking the same into the Sheriff's actual custody. Leaving a certified copy of the warrant with the usual notice upon a person having in his custody a bond belonging to the defendant in attachment is in ineffectual to attach such bond. A delivery of the bond claimed to be attached does not relate back to the time of the service of the warrant so as to vest title in the sheriff from that date. *Anthony v. Wood*, N. Y. Ct. App., 26 D. Reg. 449.

3. BAILMENT—WHAT AMOUNTS TO CONVERSION.

Where one hired a team of horses and wagon from a livery stable keeper to go to and return from a particular place by a specified route, and he deviated from said route in going and returning by a roundabout way, and stopping at another place, where the team was destroyed by an accidental fire the hirer was liable in trover for the value of the team. *Brown v. Baker*, Com. Pleas. Phila. May 6, 1884; 15 W. N. C. 60.

4. CONSTITUTIONAL LAW—EXPOST FACTO LAWS—CHANGING PUNISHMENT.

At the time of the commission of murder the punishment was either death or imprisonment for life, the penalty to be fixed by the jury. Afterward the law was changed so as to make death the punishment and divesting the jury of the authority to fix the penalty. *Held* that, so far as the law affected the rights of the party charged by depriving him of the right to the verdict of the jury upon the question of punishment, it was *ex post facto*, and void. *Marion v. State*, S. C. Neb. 20 N. W. Rep. 289.

5. CONSTITUTIONAL LAW—TAXATION — POWER OF LEGISLATURE TO VALIDATE.

It is competent for a legislature to sanction retroactively such proceedings in the assessment of a tax as they could have legitimately sanctioned in advance. *Williams v. Board*, U. S. C. C. N. D. N. Y. July 23, 1884; 21 Fed. Rep. 99.

6. CONTEMPT—INSUFFICIENT BAIL.

One who offers himself as surety knowing himself to be insolvent, and with no expectation of paying the liability thus incurred, is guilty of a fraud upon the court and upon the judgment creditor in assisting to procure the stay of proceedings granted upon such undertaking, and may be fined in the amount of the judgment for the contempt, and the payment thereof enforced by imprisonment. *Nathans v. Hope*, N. Y. Ct. Com. Pl. May 16, 1884; 5 N. Y. Civ. Pro. Rep. 401.

7. CRIMINAL LAW — INFORMATION — ENTERING DWELLING-HOUSE WITH INTENT TO COMMIT LARCENY.

Under an information charging the defendant with the crime of feloniously entering a dwelling-house with intent to commit larceny, a conviction cannot be had if the evidence shows an intent to commit some other felony. *People v. Mulkey*, S. C Cal. Aug. 18, 1884.

8. DIVORCE—SUIT FOR COUNSEL FEES—DEATH OF HUSBAND BEFORE DECREE.

Where a wife institutes suit for a divorce, and the husband dies before a decree is rendered, she cannot maintain a suit against the husband's estate for the amount of the fees charged by her counsel in the suit. But where it appears that there was good ground for the suit for divorce the counsel may themselves maintain such suit. *Handy v. Stockbridge*, Md. Ct. App. 13 Md. L. Rec. 3.

9. DUE PROCESS OF LAW—SUMMARY METHODS OF DISPOSSESSION UNDER TAXATION.

In judicial proceedings due process of law requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated to or under the power of taxation, different considerations from those which prevail between individuals obtain. It is not indispensable that a hearing be secured before assessment or before collection of the tax; but it is sufficient if reasonable provision is made for a hearing afterwards, a correction of errors, or a restitution of the tax or a part of a tax unjustly imposed. *Williams v. Board, etc.*, U. S. C. C. N. D. N. Y. July 23, 1884; 21 Fed. Rep. 99.

10. EQUITY—REFORMATION OF MARRIED WOMAN'S DEED.

While a court of equity will not aid the defective execution of a statutory power, nor enforce against a married woman the specific execution of an agreement to convey, nor give effect to a conveyance executed by her without a compliance with statutory requirements; yet, where a mortgage is executed by husband and wife, and acknowledged with all proper formalities, and shows that the lands intended to be conveyed embraced the homestead of the parties, a court of equity will correct a mistake in the description by government numbers, and thereby give effect to the intention of the parties. *Gardner v. Moore*, S. C. Ala. June 1, 1884; Reporter's Head Notes.

11. ESTATES OF DECEDENTS—SUBSEQUENT ADMINISTRATORS—LEVIES ON LANDS.

While, as a general proposition, it is true that lands of an intestate may be sold under a judgment re-

covered against his administrator upon a debt of the intestate, yet, if the lands have passed into the actual and exclusive possession of the heirs before the judgment has been recovered, and before any lien has thus been fixed upon them, they can no longer be sold under such judgment, and can only be reached by the usual proceeding to subject real estate in the hands of the heir to the payment of the debts of the ancestor, to which proceeding the heir would, of course, be a necessary party *Huggins v. Oliver*, S. C. So. Car. Charleston N. &. C. Sept. 1, 1884.

12. EVIDENCE—OPINION—CONCLUSIONS.
In a prosecution for seduction the woman alleged to have been seduced cannot be permitted, when testifying as a witness, to state that she did not willingly yield to the embraces of the defendant, or that she yielded in consequence of a promise of marriage, or of any other declaration or act on the part of the defendant; that being a conclusion or inference to be found by the jury, and not a fact to which a witness can testify. *Wilson v. State* S. C. Ala. June, 1884. Reporter's Head Notes.

13. EVIDENCE—PHOTOGRAPHIC VIEWS.
Photographic views of the locality where a nuisance is alleged to be caused by an obstruction of drainage are admissible in evidence in such a case, and the fact that they did not exhibit every part of the ground is not cause for their exclusion. *Chestnut Hill etc. Co. v. Pipe, etc.* S. C. Pa. 15 W. N. C. 56.

14. GARNISHMENT — FIRE INSURANCE — CHATTEL MORTGAGE.
Where the amount secured by a fire insurance policy upon A.'s goods, running to A., is made payable to B. as his interest may appear, (that interest being represented by a chattel mortgage,) and a loss occurs, a creditor of A. may properly garnish the insurance money in the hands of the insurer, and in the garnishment proceedings into which B. has come as "claimant," such creditor may properly attack and call in question B.'s mortgage as being fraudulent and void as to A.'s creditors. *North Star Boot Co. v. Ladd, S. C. Minn.* Aug. 11, 1884; 20 N. W. Rep, 334.

15. JURISDICTION IN DISTRICT OF RESIDENCE.
The act of congress providing that a person shall not be sued in any district other than that in which he resides, or shall at the time be found, is not one affecting the general jurisdiction of the court, but the provision is rather in the nature of a personal exemption in favor of the defendant, which he may waive. *Gray v. Mining Co.*, U. S. C. C. D. Cal. Aug. 18, 1884; 3 W. C. Rep. 538.

16. MASTER AND SERVANT—LIABILITY FOR INJURY TO LATTER—INSECURITY OF PREMISES—KNOWLEDGE.
In an action by a servant against a master, to recover damages for injuries received whilst in his employ by reason of the insecure state of the master's premises. the statement of claim must, in order to show a ground of action, allege that the plaintiff was ignorant of the insecurity alleged as the cause of the injury. *Griffiths v. The London etc.*, Eng. I . Ct. Q. B. Div., Mar. 25, 1884; 16 Chic. L. N. 408.

17. RES JUDICATA—REMEDIES—SEPARATE DEFENDANTS.
When a person has been injured by the tortious acts of several parties, he has for the injuries sustained one cause of action against all; but he may seek his remedy by suing any or all the wrong-doers. If, in an action against one, he has judgment, he cannot afterwards prosecute a joint action, because the prior judgment is, in contemplation of law, an election on his part to pursue his several remedy. *Gudger v. Western N. C. R. Co.* U. S. C. C. W. D. N. D. 21 Fed. Rep. 81.

18. SHERIFF—EXEMPTIONS — FAILURE TO LEVY—BELIEF.
The sheriff's honest belief that property, pointed out to him by the plaintiff, is exempt, is no defense for his failure to make the levy. *Abbott v. Gillespie*, S. C. Ala. June 1, 1884; Reporter's Head Notes.

19. STATUTE OF FRAUDS—VERBAL LEASE—CLAIM FOR RENT.
A parol agreement that if the plaintiff will buy land and erect a building thereon, the defendant will take a lease thereof for five years is so far invalid under the statute of frauds that the plaintiff can neither recover for the agreed rent, nor for the difference between the sums expended and the value of the premises when the defendant refused to take the lease. *Bacon v. Parker*, S. J. C. Mass. June 25, 1884; 18 Rep. 275.

20. STATUTORY CONSTRUCTION—PLEADING—ADOPTION OF CHILD.
When a statute regarding adoption provides that the petitioner for adoption shall not be a "sister or brother" of the child, the petition is not bad for failure to allege that fact. *Edds v. Parker*, S. J. C. Mass. Mass. L. Rep. Aug. 25, 1884.

21. TAXATION.
Works of art and antiquities are not "household furniture." *Lea's Appeal*, Ct. Com. Pleas, Pa. June 23, 1884; 15 W. N. C. 61.

22. TRADE MARK—NEGLECT TO USE NO GROUND FOR VIOLATION.
Neglect to use a trade mark by a manufacturer for six years, while retaining his moulds, authorizes no one to adopt such mark on the same class of goods. *Monson v. Boehm*, Eng. H. Ct. Ch. Div. March 10, 1884; 50 L. T. N. S. 784.

23. WILL—CONSTRUCTION—DEVISE TO DEAD PERSON.
Where a will provided: "The residue and remainder of the property left by my said wife shall be equally divided among my brothers and sisters and their heirs, after paying the two last named legacies," and he had but one living sister but had one dead, leaving issue, they will be permited to share in the estate according to the interest their parent would have received if living. *Huntress v. Place*, S. J. C. Mass. Mass. L. Rep. August 25, 1884.

24. WILL—CONSTRUCTION—EXTENSION OF TIME OF SETTLEMENT—RIGHTS OF EXECUTORS.
A clause in a will, "that if it is necessary my hereinafter named executors shall have five years' time to settle up my estate," will not enable sons who are executors, and amply able to pay obligations owed to the estate by them, to postpone payment of their debts, and a settlement of the estate for five years. *Riegel's Appeal*, S. C. Pa. May 19, 1884; 15 W. N. C. 57.

QUERIES AND ANSWERS.

QUERIES.

35. In the absence of a statute can a married woman be appointed an administratrtx? What was the rule at common law? T. C.

36. A purchased from B a horse, giving as security for payment promissory notes and a chattel mortgage. A thereafter performs labor and service for B with the express understanding that part of the same shall be applied as full payment of the notes. B thereafter refusing to deliver to A his notes or to pay anything on the service, A brings an action, in justice court, for the full amount of his claim and recovers judgment for same from which judgment B appeals. After judgment, and before appealing, B brings against A an action in replevin under his mortgage to recover possession of the horse. Question: Had B instead of bringing his action of replevin sued A on his notes could not A have set off his judgment as original claim and recovered against B judgment for the difference and cannot A by resort to similar proceeding defeat the replevin action brought by B and founded on the note and mortgage? Please cite authorities.
E. F. H.

Topeka, Kas.

QUERIES ANSWERED.

Query 17. [19 Cent. L. J. 93.] When a party entered public land under the homestead act of 1862, occupied it for five years and was entitled to a patent. After he was entitled to a patent and before patent issued he contracted a debt. After patent issued a judgment was rendered on the indebtedness. Is the homestead subject to execution to pay said judgment, or is it exempt under the section of the homestead law exempting homestead from any debt contracted prior to execution of the patent? M. & T.

Answer. As the patent had not been issued when the debt was contracted, the statute itself would seem to be the best answer to this inquiry. That it is exempt, was practically decided in Miller v. Little, 47 Cal. 348, although the exact point here was not referred to. B.

Query 25. [19 C. L. J. 177.] A bought a horse of B, and in payment gave his note for $100, secured by chattel mortgage, (duly recorded, etc.). At maturity of the note A had paid $80. He (A) then borrowed the remaining $20, giving his note with B as surety. The old note was given up. B as surety paid the $20 note. A in the meantime sold the horse to C. Can B reach the horse in hands of C to make up the debt he had to pay as surety of A? Please cite authorities.
Peru, Ind. S. & M.

Answer. He cannot. The note which the mortgage secured was paid, satisfied and discharged, which operated as a full discharge of the mortgage. See Ripley's Digest, (Ind.) page 1115, sec. 24347, and cases there cited. C. M. ALWARD.
Warsaw, Ind.

Query 30. [19 Cent. L. J. 196.] A is a young, ignorant woman, an heir to interest in a tract of land in Missouri; she lives in Illinois. B, her attorney and confidential agent, is employed by a town company to buy her interest in this tract. It is worth $50,000; pays $200 for a quit claim through false representations of the value of the land. Prior to their obtaining a quit claim deed from A, the town company has made waranty deeds to purchasers of town lots. They did not have the entire and perfect title when the said deeds were made. Can the quit claim from A obtained in the manner stated revert and make good those deeds? Cite authority. D.
Carthage, Mo.

Answer. Undoubtedly the after acquired title from A, enures to the benefit of the grantees of the Town Company, under warranty deeds, and cures the defect in the title originally attempted to be transferred. See Rawle on Covenants for Title, pages 392 and 266, and cases there cited; especially Reese v. Smith, 12 Mo. 344; Baxter v. Bradbury, 20 Me. 262; King v. Gilson, 32 Ill. 355. M.
Indianapolis.

RECENT LEGAL LITERATURE.

MICHIGAN NISI PRIUS CASES. Michigan Nisi Prius cases, decided by the State and Federal courts in Michigan to which are added brief Biographical sketches of the Judges of Michigan, past and present, law anecdotes and reminiscences, also law miscellanies. Edited and compiled by Charles B. Howell L.L.B. of the Detroit Bar, Detroit, Richmond, Backus & Co., 1884.

This book is a good thing. There are many *nisi prius* decisions which are excellent, yet which are buried in obscurity because not rendered by courts of last resort. In Ohio, Pennsylvania and New York the decisions of the lower courts are published with the same readiness, and devoured by the bar with the same avidity as those of the Supreme tribunals of the States, when upon important questions. The impartial author will cite without any hesitation Smith v. Jones 7 Phila. 367, to support any statement of the law laid down by him, although it comes only from Common Pleas of Philadelphia No. 1, Gas, J., presiding. But this volume does more. It publishes many speeches of such great advocates as Donovan, Atkinson & Lathrop, which are marvels of eloquence, and wrested verdicts from juries, which no impartial scrutiny of the evidence would justify. Donovan is at his best, when, as the our esteemed trinitarian neighbor, the *American Law Review* expresses it, he is "pulling the wool over the eyes of sapheaded jurors." Many persons have written books advising young attorneys how to win cases, who themselves have proved such egregious failures that want compelled them to write, just as many paupers are continually advising others "how to get rich," but Donovan, author of "Trial Practice," speaks from the platform of experience with a knowing "nudge" that has captivated juries and set guilty culprits free. It is a pleasure to read speeches delivered by such men, and the compiler of the book before us has shown good taste in his selection of them. A brief biography of all Michigan's judges past and present, with some anecdotes closes the book. It deserves reading by every young man, and old men can spend many hours in less profitable pastime than an oc-

casional perusal of something Mr. Howell says or represents other people as saying.

INDEX TO AMERICAN REPORTS. Index to American Reports, from 1st to 38th inclusive. By W. H. Trammell of the Huntingdon, Indiana Bar. Indianapolis. Merrill, Meigs & Co., 1883.

It will be remembered that Irving Browne prepared an excellent index-digest to the same reports, but "this book is simply what its title signifies, an index." Irving Browne is making a capital editor of the Reports, showing by his selection of cases a keen appreciation of the wants of the practitioner. What is in a series of such value is what the profession must know. Of course the easiest way of finding that out, is by a good index. This index is one of that quality, and will do very well as a book to be placed side by side with Irving Browne's index-digest, for the old proverb assures us that "two heads are better than one." It is very full and the indexer shows a keen power of discrimination in the selection of titles whereunder to put his points. Some things, however, are to be found where we would place them. For example, under "Admissions" we find "Dying Declarations, when competent." This is the first time we understood dying declarations to be classed under admissions. They are generally accusations. Perhaps in these cases, however, they happened to be admissions. We have examined many things, however, and we found everything just where we expected to find them, which is the only test of the quality of an index. We are glad to see that Mr. Trammell did not put under "Eagle's Eyes" the old point that courts of equity will watch with "eagle's eyes" certain transactions, as one of our good (?) indexers is said to have done; or under "Great Minds" the statement of some English judge that he had "a great mind" to do a thing, as another is said to have done; but the titles and indexing is practical and the book should become popular. If pushed, it will doubtless become so.

LEGAL EXTRACTS.

COMPROMISES AS CONSIDERATION FOR PROMISES.

If there be a dispute between parties, in which one of the parties not only makes a *bona fide* claim against the other but there is in law and fact some foundation for his claim, though whether it be well founded may be doubtful, and the party, who is thus claimed to be subject to a liability, to settle the dispute and avoid litigation agrees to pay the other party a sum of money or makes to him promises to do anything else, such promise is based on a sufficient consideration and may be enforced, Zane's Devisees v. Zane, 2 Munf. syl. 2, p. 406; Longridge v. Dorville, 5 B. & Ald. 117; Blake v. Peck, 11 Vt. 483; Truett v. Chapline, 4 Hawks. 178; Taylor v. Patrick, 1 Bibb. 168; Brown v. Sloan, 6 Watts 321; Stoddard v. Mix, 14 Conn. 12; Wilbur v. Crane, 13 Pick. 284; Union Bank v. Geary, 5 Pet. 114. But to make such consideration good it is not only necessary, that the dispute should be one in which one party sets up that there was a liability on the other, but if it be assumed that such liability exists when in fact or law there is no foundation for such liability, a promise made by the party, who is thus claimed to be liable, but who clearly is not liable either in law or equity, would be a promise made on no valuable or sufficient consideration, and it could not be enforced by suit. Cabot v. Haskins, 8 Pick. 83; Gould v. Armstrong, 2 Hall [N. Y.] 266; Lowe v. Weatherby, 4 Dea. & R. 212; Jones v. Ashburton, 4 East, 455; Smith v. Algar, 1 B. & Ad. 604; Martin v. Black's Ex'or 20 Ala. 30; New Hampshire Savings Bank v. Colcord, 15 N. H. 119, and Wade v. Simeon, 2 C. B. 548. But as before stated mere proof, that the liability is doubtful, will not render the consideration insufficient. The liability of the party making such promise must be shown to have no foundation.—*Green, J., in Davisson v. Ford*; 23 *W. Va.*, 617.

NOTES.

——A very nice point came before Colburn, J., of the Massachusetts Supreme Judicial Court, a few days ago, in a *habeas corpus* case. A minor had been arrested on execution, and Judge Colburn, while of opinion that the judgment against the minor was valid, until reversed, although no guardian *ad litem* was appointed in one suit and the other was brought without any *prochein ami*, (in both of which the minor came out second best), was of opinion that a minor was not subject to arrest. In Massachusetts the old common law right of imprisonment on execution still exists, except that the debtor is examined and given an opportunity to take the poor debtor's oath, before he is actually placed under arrest. While we know of no case which ever decided that a minor was or was not subject to imprisonment for debt at common law, we are unable to perceive any reason why, in a suit for the recovery of indebtedness for which the minor is responsible, as, *e. g.*, for necessaries, when judgment is properly rendered against him, and execution awarded, he is entitled to any exemption which adults do not enjoy. So far as a claim for necessaries is concerned, the judgment is against him, generally, not as an infant, but as a person acting for himself, competent to act for himself, and bound to others as if he were an adult. And if one of the incidents of a judgment at common law was emprisonment on execution, (and that it was cannot be denied) what reason can be offered why the creditor was not entitled to the body of his execution debtor although he happened to be in his "teens?" It is certainly paradoxical to say that a minor is just as responsible for his debts for necessaries as an adult, and yet deprive the creditor of one of the securities he had for the collection of that debt. We do not know the reasons upon which the decision of the learned judge was founded, but the case has been reported to the full bench, which will 'ere long dispose of this pretty point. In the meantime the "infant" who caused the fuss is at large on bail, and is breathing the "atmosphere of freedom." Verily, the "infants" are troublesome.